



# Commonwealth of Massachusetts State Ethics Commission

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## CONFLICT OF INTEREST OPINION EC-COI-00-2

### FACTS:

You are legal counsel to the Town of ABC ("Town") Retirement Board ("Board"). You ask: Is the Board a "municipal agency" and are individuals who hold positions on or perform services for the Board "municipal employees" within the meaning and subject to the restrictions of G.L. c. 268A, the conflict of interest law?<sup>1/</sup>

Chapter 32 of the General Laws (Law) establishes a uniform framework and comprehensive statutory scheme providing for retirement systems and pension rights and benefits for public employees in the Commonwealth. The Law governs the creation, structure, administration, operation and supervision of such retirement systems. The regulations, 840 CMR 1.00 (Regulations), promulgated by the Public Employee Retirement Administration Commission (PERAC) or its predecessor pursuant to G.L. c. 32, §21 and G.L. c. 7, §50, further elaborate on the Law.

PERAC has "general responsibility for the efficient administration of the public employee retirement system." G.L. c. 7, §50. PERAC also has broad-ranging oversight, guidance, monitoring and regulatory responsibilities over the 106 public employee retirement boards and systems operating pursuant to the Law in the Commonwealth.

The Law authorizes municipalities, through the local option process, to establish retirement systems and boards. G.L. c. 32, §28. Once having accepted the Law establishing a retirement system for its employees, a municipality may not revoke its action. G.L. c. 4, §§4A and 4B. Generally, the Law prescribes that all persons whose regular compensation is paid by a municipality and who are "regularly employed in the service of" any such municipality, other than public school teachers (who are members of the state Teachers' Retirement System), are "members in service" of the retirement system pertaining to their municipalities. G.L. c. 32, §§1 ("employee") and 3. The retirement system's "legal obligations . . . consist of liabilities for a spectrum of retirement and similar benefits including benefits upon retirement of members for superannuation or for ordinary or accidental disability, as well as benefits in the form of termination allowances in certain cases of resignation of members, failure of reelection or reappointment, removal, or discharge [and death benefits for members' survivors]." *Opinion of the Justices*, 364 Mass. 847, 852-53 (1963).

The Town Retirement System ("Retirement System") has three sources of funding. First, through payroll deductions, in-service members contribute a statutorily prescribed percentage of their pay to their retirement system's annuity savings fund. Second, through annual appropriations sufficient to amortize past unfunded liabilities and satisfy future liabilities based on actuarially projected liabilities prepared by PERAC, the System's governmental units contribute amounts sufficient to satisfy the legal obligations of the system's pension fund, special military service fund and expense fund, from which "all expenses of administration of the system" are paid. G.L. c. 32, §22(1), (3), (4) and (5). Third, investment income augments the System's funds.

More than 60 years ago, the Town accepted the provisions of the Law establishing the Retirement System for its employees.<sup>2/</sup> The Board, established pursuant to §20(4)(b) of the Law, has five members: the Town Accountant, serving ex officio; an appointee of the Town Board of Selectmen<sup>3/</sup> ("Selectmen"); two members "elected by the members in or retired from service of such [retirement] system from among their number in such manner and for such term, not exceeding three years, as . . . [the Selectmen] shall determine"; and a fifth member (who may not be a Town employee, retiree or official) chosen by the other four for a 3-year term. G.L. c. 32, §20(4)(b). As provided by the Law, the Board members are not compensated because Town Meeting has not accepted the local option provision permitting Board members to be paid \$3,000 annual stipends. G.L. c. 32, §§20(4)(d) and 20(6).

Among its general powers and duties, the Board is authorized to promulgate by-laws, rules, regulations and investment guidelines consistent with the Law and Regulations and subject to PERAC's approval; retain investment and money managers and consultants to assist in investing funds; process death and retirement benefits and refunds and conduct related hearings; and employ personnel to run the system's day-to-day operations. The Law and Regulations prescribe detailed requirements for membership in the Retirement System, members' contributions, benefit eligibility and most other aspects of members' rights and obligations and the Systems' operations, including funding and accounting methods, prohibited investments and reporting and auditing requirements.<sup>4/</sup>

As permitted by the Law, the Board currently employs, supervises and directs one full-time employee. The Board determines her job responsibilities, salary and vacation time; she is not covered by any Town collective bargaining agreement. The Board pays her compensation out of its expense fund, which is funded by appropriations from the Town. At the Town's expense, the Board's employee receives all benefits that the Town's employees receive: she is a member of the Retirement System and is covered by the Town's group health insurance plan and the Town's workers' compensation insurance. She is also a member of the Town employees' credit union and participates in the Town's deferred compensation plan. There is no municipal by-law or contract between the Town and the Board that governs the Board's employee's benefits.

The Law provides that the city solicitor or town counsel, if any, of the municipality shall be its retirement board's legal adviser "except in such cases as the board deems [it] necessary" to employ other counsel. G.L. c. 32, §20(4)(f). The Board has retained its own legal counsel. The Law requires the municipal treasurer to act as treasurer-custodian of the Retirement System's funds. G.L. c. 32, §23(2). As permitted by the Board pursuant to the Law, the Town Treasurer receives \$1,500 per year, payable from the expense fund, for his services as custodian of the System's funds. G.L. c. 32, §20(4)(g). The Town Treasurer also reconciles all of the System's bank accounts and, at the Board's direction, disburses funds. The Town Accountant oversees the accounting functions of the System and, as authorized by Town Meeting through the local option process, receives \$3,000 per year (instead of \$1,500) payable from the expense fund, for his "services rendered in the active administration of the system." G.L. c. 32, §§20(4)(d) and 20(4)(d $\frac{1}{2}$ ). The Board does not employ its own auditor. Rather, the Town's auditors audit the System annually. The Board engages its own actuary to determine and report to PERAC how much the Town must appropriate for the System each year, and PERAC verifies this amount.

The Law provides that retirement board members and others who handle the system's funds are "fiduciaries"<sup>5/</sup> and subject to fiduciary standards. G.L. c. 32, §§1 & 23(3). The Regulations include separate provisions establishing a code of ethics and standards of conduct

for fiduciaries, 840 CMR 17.02-17.03, which specifically provide that “[e]very fiduciary shall know and comply with all applicable provisions of M.G.L. c. 268A governing the conduct of public officials and employees and shall conform to the standards of conduct prescribed by M.G.L. c. 268A, §23.” 840 CMR 17.03.

The Law includes many local option provisions whereby the Town, through Town Meeting, G.L. c. 4, § 4, may choose to accept various procedures, rights, benefits and obligations, in addition to those already mandated by the Law. Town Meeting has accepted at least 10 of those local option provisions, including one providing that the Town will indemnify Board members and one permitting the Board to grant cost of living adjustments (COLA’s). G.L. c. 32, §§20A and 103.

The Board has its own federal taxpayer identification number and “errors and omissions” insurance coverage and purchases its own supplies. The Board occupies an office, rent-free in Town Hall.

## **QUESTION**

Is the Board a municipal agency within the meaning of G.L. c. 268A, the conflict of interest law?

## **ANSWER**

The Board is a municipal agency within the meaning of the conflict of interest law and, as such, individuals who perform services for or hold offices, positions, employment or membership in or on the Board are municipal employees within the meaning of that law.

## **DISCUSSION**

There are only three definitional categories for public agencies under the conflict of interest law: state, county and municipal agencies. The Law does not explicitly characterize retirement boards as “public” by contrast with many entity-creating or -authorizing statutes.<sup>6/</sup> While separate statutes provide that the State Employees’ Retirement Board and Teachers’ Retirement Board, both created pursuant to the Law, are to be “in” or “within” specified state agencies,<sup>7/</sup> the Law does not expressly “place” municipal retirement boards “in” or “within” any other public agency or private entity.<sup>8/</sup> As the Law was first enacted in the mid-1940’s,<sup>9/</sup> it could not have addressed the character of municipal retirement boards for purposes of statutory schemes enacted years later, such as the conflict of interest law, the public records law, G.L. c. 66, and the open meeting law. G.L. c. 39, §§23A *et seq.*

We recognize that, for other purposes, courts have considered retirement boards established under the Law, not as “municipal departments,” but as independent of the municipalities whose employees they serve. See *Everett Retirement Board v. Board of Assessors of Everett*, 19 Mass. App. Ct. 305, 308 (1985) (expense fund component of city retirement system budget certified by retirement board for payment by the city was not subject to municipal control under any provisions of Municipal Finance Law and that retirement board “is independent of the host municipality”); *O’Connor v. Bristol County*, 329 Mass. 741, 494 (1953); *Stone v. Treasurer of Malden*, 309 Mass. 300, 302 (1941). See also *In the Matter of the City of Brockton, et al.*, 19 MLC 1139 (1992) (where Massachusetts Labor Relations Commission

decided that, for purposes of collective bargaining under G.L. c. 150E, city's retirement board, not city, is "public employer" because board has total fiscal and administrative autonomy).

That municipal retirement boards created pursuant to the Law are fiscally and administratively autonomous for purposes of certain statutory schemes does not, however, control whether the Retirement Board is a "municipal agency"<sup>10</sup> within the meaning of the conflict of interest law, whose broad prophylactic purposes are distinct and different. The conflict of interest law was "enacted as part of 'comprehensive legislation . . . [to] strike at corruption in public office, inequality of treatment of citizens and the use of public office for private gain.'" *McMann v. State Ethics Commission*, 32 Mass. App. Ct. 421, 427 (1992), *citing Everett Town Taxi, Inc. v. Everett*, 366 Mass. 534, 536 (1974), *quoting* Report of the Special Commission on Code of Ethics, 1962 House Doc. No. 3650 at 18.

When determining whether a body such as the Board is a public agency within the meaning of the conflict of interest law, the Commission has used a multi-factor analysis, which the Supreme Judicial Court has recognized as appropriate. *MBTA v. State Ethics Commission*, 414 Mass. 582, 588 (1993) (concluding that the Massachusetts Bay Transportation Authority Retirement Board (MBTA) is not a "state agency" within the meaning of G.L. c. 268A, §1(p)). Those factors are:

- (1) the means by which the entity was created (e.g., legislative, administrative or other governmental action);
- (2) the entity's performance of some essentially governmental function;
- (3) whether the entity receives or expends public funds; and
- (4) the extent of control and supervision of the entity exercised by government officials or agencies.

Also, as suggested in *MBTA*, we take into consideration the extent to which there are significant private interests involved in the entity under review or whether the state or its political subdivisions have the powers and interests of an owner. *MBTA*, 414 Mass. at 588-589. See also *EC-COI-95-10*; *95-1*; *94-7*.

As to these factors, we have said that "[n]o one factor is dispositive; rather the Commission will balance all of the factors based on the totality of the circumstances." *EC-COI-92-13*. When reviewing and balancing the factors, we are also mindful of the prophylactic purposes of the conflict of interest law.

We now apply these factors and considerations to the facts of this case.

- (1) Was there a statutory, regulatory, administrative or other governmental impetus for the Board's creation?

The Town chose irrevocably to establish, for the benefit of the Town's employees, the Retirement System and Board, as prescribed by a comprehensive statutory and regulatory scheme, vesting the Board with its powers and duties. The Law and Regulations generally prescribe detailed System membership eligibility criteria; creditable service qualifications; requirements and formulas for determining benefits; the various retirement payment options; hearing and appeal rights; composition, powers and duties of retirement boards, including

financial and other reporting; oversight and review by PERAC, as discussed above; methods of financing and appropriating and accounting for, holding, managing and investing funds. See G.L. c. 32, §§1-28; 840 CMR 1.00 *et seq.*

The Law prescribes the composition of the membership of the 5-member Board, including, the Town Accountant and the Selectmen's appointee, who presumably (because the Law specifies no term), serves at the pleasure of the Selectmen. Two of the three remaining positions could be filled by current Town employees.

By contrast, it was of critical significance to the *MBTA* court, when concluding that the MBTA Retirement Board was not public, that the Board and the MBTA retirement system were established and evolved through negotiated collective bargaining processes, rather than pursuant to a statute, regulation or executive order. The court found "[n]otably absent from the creation of the [MBTA retirement] board is any action of the Commonwealth" and could not "discern any legislative underpinning, even indirect, for the creation of the board." *MBTA*, 414 Mass. at 589-590 (emphasis added).

In this case, we find abundant evidence that the Retirement System and Board have significant "legislative underpinnings" and that there was and remains a strong and direct governmental impetus at the municipal level for the creation and maintenance of the System and the Board.

(2) Does the Board perform some essentially governmental function?

Rather than being contractually negotiated undertakings, the establishment and maintenance of the Retirement System and the continued provision of retirement benefits administered by the Board were undertaken irrevocably as obligations by and of the Town when the Town decided to assure its employees of retirement and pension benefits and rights. We consider the Retirement System's provision of retirement benefits as mandated by the Law to constitute the performance of an essential governmental function. This conclusion is consistent with our precedent, in which we have found "governmental functions where those functions were contemplated by either state or federal legislation." See, e.g., *EC-COI-82-25* (regional school district provides educational services mandated by law); *92-26* (nonprofit collaborative assisting school committees in their "traditional governmental function"); (private industry councils implement federal Job Training and Partnership Act); *89-20* (regional employment boards implement federal Job Training Partnership Act). Compare *EC-COI-88-19* (private company's provision of public and educational cable television access pursuant to a contract between city and cable company not essentially governmental function).

We also consider it significant that the Retirement System's retirement contributions and eventual benefits are in lieu of those provided by the Social Security System. Public employees of the Commonwealth and its political subdivisions who are covered by a public employer's retirement plan are not required to participate in or contribute to the Social Security System<sup>11/</sup> retirement program because the Commonwealth has chosen not to enter into so-called "Section 218 agreements"<sup>12/</sup> between the state and the Commissioner of the Social Security Administration whereby the state's public employees are made subject to and have the benefit of the Social Security System's retirement program. By contrast, most employees of private employers are required to participate in and contribute to the Social Security System even if their private employers have their own pension plans.

Thus, Town employees are not required to pay so-called FICA taxes<sup>13/</sup> and do not, as such, have any rights to receive retirement benefits under the Social Security System, “a comprehensive contributory insurance plan,” conceived and designed in large part “to protect workers and their dependents from the risk of loss of income due to the insured’s old age, death, or disability.” 70A Am Jur 2d, Social Security and Medicare, §14 (citations omitted). In short, the Retirement System assures retirement benefits as a de facto substitute for those otherwise mandated by the Social Security System.

Furthermore, we consider it significant that, if the Board had not chosen to engage your law firm as its legal adviser, the Law would assign that function to Town Counsel.<sup>14/</sup> If such legal services are provided by salaried employees of the municipality (town counsel or city solicitor), it is PERAC’s view that the Law does not permit them to receive extra compensation for such services to a retirement board.<sup>15/</sup> This suggests that the Legislature and PERAC consider it an appropriate, if not necessary, part of town counsel’s responsibilities to provide legal services to the municipal retirement board.

When determining that the MBTA Retirement Board did not perform an essential governmental function, the court in *MBTA* wrote:

Clearly, these functions, which are fiducial in nature and performed most often by private entities, are not “essentially governmental” functions. The fact that the Commonwealth may perform these functions for the benefit of certain State employees does not transform the nature of these functions to governmental.

*MBTA*, 414 Mass. at 590.

That statement followed from the court’s characterization of all aspects of MBTA’s retirement program as a contractual (not a statutory) creation, which is clearly distinguishable from the Town Retirement System, a statutory creation. We also note that the court did not address whether the MBTA’s retirement program substituted for or supplemented benefits under the Social Security System. In fact, the MBTA’s employees contribute to both the Social Security System (through payroll deductions of FICA taxes) and the MBTA’s retirement program.

### (3) Does the Board receive or expend public funds?

Through its annual appropriations based on actuarially projected liabilities, the Town provides funding for the Retirement System’s pension fund, special military service fund and expense fund, including all of the System’s administrative expenses (such as those for the Board’s full-time employee and professional services from its actuary, your law firm and other consultants and financial advisers). If the System has a shortfall, the Town must appropriate funds to cover it. Furthermore, the Town may not reduce the funds the Board requires and certifies. See *Everett Retirement Board*, *infra*. Additional funding is provided by members’ payroll-deduction contributions (5%-9%) and investment income.

The Town’s obligations to provide public funding are mandated by the Law and Regulations; they are not contractually based.

As further indication that the Town funds or supports the Board’s operations, we note that the Board’s sole employee (i) is a member of the System, (ii) receives (at the Town’s expense) all benefits that Town employees receive, e.g., group health insurance and workers’ compensation coverage, (iii) is a member of the Town employees’ credit union and

(iv) participates in the Town's deferred compensation program.<sup>16/</sup> In addition, the Board occupies office space in Town Hall rent-free; although not required by the Law, the Town auditor audits the System; and, as authorized, but not required, by the Law, the Town has chosen to indemnify the Board members for expenses and damages arising from the performance of their official duties.<sup>17/</sup>

Again, *MBTA* is distinguishable because the MBTA's obligation to make the payments is a contractually determined form of employee compensation that, once paid, becomes private in nature due to the "significant private interests of the pension fund members and their beneficiaries."

(4) To what the extent do government officials or agencies control and supervise the Board?

The Town does not control or supervise the 5-member Board because, among other reasons, the Town Accountant and the Selectmen's appointee<sup>18/</sup> do not constitute a majority of the Board and because, as fiduciaries, the Board members "owe their primary loyalty to the members and beneficiaries" of the Retirement System and "cannot be controlled in the traditional sense by any outside body." *MBTA*, 414 Mass. at 592; G.L. c. 32, §23(3) and 840 CMR 1.01, 1.02.

On the other hand, the Law appears to give the Selectmen the discretion to establish the terms for the two elected Board members at less than three years and to have their appointee to the Board serve at their pleasure. Through the Town Accountant, the Town Treasurer, who serves as treasurer-custodian (under the direction of the Board) of the Retirement System's funds, and the Town auditor, Town officials play significant roles in the System. Also, PERAC has significant oversight and engages in periodic, as well as mandatory review, of the Board's and System's operations and certain of its determinations, e.g., grants of benefits and power to discipline Board member, constitute governmental control.<sup>19/</sup>

We also consider it significant that the Board has authority to undertake certain significant activities only if Town Meeting accepts the Law's local option provisions. Town Meeting has approved at least 10 of such local option provisions, including those authorizing (i) the Board's granting of COLA's to retirees and their beneficiaries; (ii) the Town Accountant's receipt of \$3,000 per year (instead of the maximum \$1,500 per year otherwise prescribed by the Law); and (iii) the Town's indemnification of the Board members for damages and expenses incurred while acting within the scope of their official duties (which the Law would not otherwise require). By contrast, Town Meeting has not accepted the local option provisions that would (i) authorize the Board to increase from \$1,500 (permitted by the Law) up to \$3,000 the compensation of the Town Treasurer for serving as custodian of the Retirement System's funds or (ii) authorize the Board members to receive a stipend of up to \$3,000 (rather than no compensation, as the Law otherwise provides).<sup>20/</sup> See G.L. c. 32, §§20(4)(h) and 20(6). In short, the Town and Town officials continue to decide significant aspects of the Board's operations.

Finally, as to the additional consideration, following the reasoning in *MBTA*, we find that the private interests of the Retirement System's members and their beneficiaries is significant and that the Town does not have the powers and interests of an owner. We do not, however, find this consideration controlling.

Beyond the factors applied above, we consider it significant that PERAC (and its predecessor agency), the very agency charged with oversight of the public employee retirement system in the Commonwealth,<sup>21/</sup> promulgated a Regulation that provides that "every fiduciary

[including Board members] shall know and comply with all applicable provisions of M.G.L. c. 268A governing the conduct of public officials and employees and shall conform to the standards of conduct prescribed by M.G.L. 268A, §23.” 840 CMR 17.03. All such Regulations are subject to the approval of the General Court with whom they must be filed, and, if the General Court takes “no final action” within 45 days of such filing, the Regulations are deemed approved. G.L. c. 7, §50(a). Thus, it must be presumed that the General Court reviewed and approved the Regulations requiring Board members to comply with the conflict of interest law. The Commission should not disturb that determination absent compelling circumstances, which are not present here.

Balancing the factors applied above in light of the totality of the circumstances and the purposes of the conflict of interest law, we find that the Board is a municipal agency. Consequently, individuals who perform services for or hold offices, positions, employment or membership in or on the Board are municipal employees for purposes of the conflict of interest law.

**DATE AUTHORIZED:** June 21, 2000

<sup>1/</sup>You and, with your permission, personnel of the Public Employee Retirement Administration Commission have provided us with relevant information.

<sup>2/</sup>See G.L. c. 32, §§28(1) and (2).

<sup>3/</sup>The appointed member has no statutorily prescribed term.

<sup>4/</sup>See G.L. c. 32, §§ 3, 4-5, 6-9, 12-13, 20(4), 20(5), 21(1), (3) and (5), 22 & 23(2); 840 CMR 4.00, 5.00, 10.00, 16.00, 18.00, 21.00, 25.00 and 26.00.

<sup>5/</sup>“A fiduciary . . . shall discharge his duties for the exclusive purpose of providing benefits to members and their beneficiaries with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims and by diversifying the investments of the system so as to minimize the risk of large losses unless under the circumstances it is clearly prudent not to do so.” G.L. c. 32, §23(3) and 840 CMR 1.01.

<sup>6/</sup>For example, water and sewer commissions established by local option are “independent public instrumentalities” performing “an essential governmental function” and are municipal agencies for purposes of the conflict of interest law, G.L. c. 40N, §4, as are fire districts and housing and redevelopment authorities. G.L. c. 48, §90 and c. 121B, §7, respectively.

<sup>7/</sup>The State Employees’ Retirement Board serves “in” the Department of the State Treasurer. G.L. c. 10, §18. Established by G.L. c. 15, §16, the Teachers’ Retirement Board is “within” the Executive Office for Administration and Finance. G.L. c. 7, §4G. See 1989 Op. Att’y Gen. No. 2, Rep. A.G., Pub. Doc. No. 12 at 110 (1988).

<sup>8/</sup>The Law does provide that “[t]he contributory retirement system established in any city or town” pursuant to the Law shall include the name of the municipality and that “[e]ach such city or town system shall be managed by a retirement board which shall have the general powers and duties set forth in” G.L. c. 32, §20(5) (emphasis added).

<sup>9/</sup>With the enactment of St. 1945, c. 658, §1, the Legislature attempted to collect in one chapter the various statutes regulating a variety of public employee retirement systems. 18 Randall & Franklin, Mass. Pract. § 381 (4<sup>th</sup> ed. 1993) (citations omitted).

<sup>10/</sup>“Municipal agency’, any department or office of a city or town government and any council, division, board, bureau, commission, institution, tribunal or other instrumentality thereof or thereunder.” G.L. c. 268A, §1(f)



<sup>11/</sup> Although, when first enacted in 1935, the Social Security Act (now 42 U.S.C. §301 *et seq.*) prohibited participation by states and localities, the Omnibus Budget Reconciliation Act of 1990, P.L. 101-508, 104 Stat. 1388, “required coverage of all state and local government employees not covered by a public employer’s retirement plan providing benefits comparable to Social Security.” “The Cost Impact of Mandating Social Security for State and Local Governments,” Report prepared by The Segal Company, a consulting firm specializing in actuarial, compensation and benefit matters (May 1999).

<sup>12/</sup> See 42 U.S.C. §418, originally enacted as §218 of the Social Security Act.

<sup>13/</sup> The Social Security Act’s related taxing provisions, formerly incorporated into the Act, are now codified in the Federal Insurance Contributions Act (FICA), 26 U.S.C. §3101, and the Federal Unemployment Tax Act, 26 U.S.C. §3301.

<sup>14/</sup> By comparison, in *MBTA*, the court observed that “[t]he [retirement] board has always been advised and represented by privately retained counsel.”

<sup>15/</sup> See March 12, 1997 and June 16, 1997 opinion letters of John J. McGlynn and Robert F. Stalnaker, PERAC’s former and current Executive Directors, respectively, relating to the Stoneham Retirement Board, and January 28, 1999 opinion letter of Joseph I. Martin, PERAC’s current Deputy Executive Director, to the Methuen Retirement Board.

<sup>16/</sup> By comparison, in *MBTA*, the court observed that the MBTA Retirement Board’s employees “do not participate in the State retirement system are not covered by the Commonwealth’s group insurance” and “are ineligible for the Commonwealth’s deferred compensation program and are not public employees for workers’ compensation purposes.”

<sup>17/</sup> By comparison, in *MBTA*, the court observed that “[j]udgments against the board are not the obligations of the MBTA or the Commonwealth and the MBTA does not guarantee the obligations of the fund.” *MBTA*, 414 Mass. at 586.

<sup>18/</sup> In *MBTA*, the court found that the MBTA’s three appointees do not control the 7-member MBTA Retirement Board.

<sup>19/</sup> Among its responsibilities, PERAC promulgates rules and Regulations pertaining to retirement boards’ accounting, record-keeping, investments, expenditures, payments and granting benefits; at least every three years, reviews each system’s entire operation and performs an actuarial evaluation of each system; conducts tri-annual audits and valuations of each system; provides actuarial services, training and assistance to retirement boards that choose to use its services; reviews retirement boards’ grants of retirement and death benefits; and may discipline retirement boards. G.L. c. 7, §49, 50; G.L. c. 32, §§21 and 22; 840 CMR 1.00. See also 18 Randall & Franklin Mass. Pract. §§381, 384 (4<sup>th</sup> ed. 1993).

<sup>20/</sup> According to Town records, earlier this year the Board proposed a warrant article that would have authorized Board members to receive \$3,000 annual stipends, but withdrew it after the Town Finance Committee indicated, consistent with its position with respect to other Town boards, that it would not support the Board members’ receipt of stipends.

<sup>21/</sup> By comparison, in *MBTA*, the court observed that the MBTA Retirement Board has always been treated as private by state regulators.